Supreme Court, U. S.
FILED
AUG 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1552

CLAUDIO CASTANEDA, Sheriff,

Petitioner,

—v.—

RODRIGO PARTIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1522

CLAUDIO CASTANEDA, Sheriff,

Petitioner,

v.

RODRIGO PARTIDA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE FACTS

Respondent RODRIGO PARTIDA was indicted by the March Term, 1972 grand jury for the 92nd District Court of Hidalgo County, Texas. Partida complained that the grand jury that returned the indictment had a characteristic in common with all Hidalgo County grand juries over at least the previous ten years--that Mexican-Americans were systematically excluded or underrepresented on the grand jury panels. In a jurisdiction where Mexican-Americans comprised approximately 79.2% of the population, only 39% of the jury pool chosen by the various commissioners were of Mexican descent. The Respondent prisoner has urged that the gross underrepresentation of his ethnic group--the product of an abuse-prone selection system--raised a strong inference of discrimination that his prosecutors were required to rebut, a rebuttal which has never been forthcoming.

Texas uses the commissioner system for selection of grand juries. Briefly stated, the district judge selects three to five commissioners prior to the beginning of each term of court. Art. 19.01, Texas Code of Criminal Procedure. The commissioners then select from fifteen to twenty persons as potential grand jurors, persons who meet the statutory qualifications. Art. 19.08. After the fifteen to twenty persons so chosen are "tested," Art. 19.21, and are "interrogated," Arts. 19.22 and 19.23, the district judge then empanels twelve of the qualified jurors as a grand jury. Art. 19.26. During the period of which complaint is made, 1962-

1972, the Hidalgo County grand jury commissions met either five or six times each year and generally chose either sixteen or twenty persons as potential grand jurors. Defendant's Exhibit No. 1, App. 17.[1]

At the evidentiary hearings conducted by both the state and federal district courts, Partida sought to show that Mexican-Americans are an identifiable ethnic group within the jurisdiction in question and one that has been subject to discrimination. Respondent relied heavily upon data from the 1970 Census of Population conducted by the United States Census Bureau, Department of Commerce. The data submitted was both for the state as a whole and for Hidalgo County, in particular, which is included in its entirety in the Bureau's McAllen-Pharr-Edinburg Standard Metropolitan Statistical Area. Defendant's Exhibits Nos. 2 through 5, App. 19-21, are tables showing the condition of Mexican-Americans in the social and economic community for the State of Texas as a

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[1]References, unless otherwise noted, are to the record on appeal in the state courts, which is entitled "Transcript of Proceedings Had and Statement of Facts." That entire record was admitted into evidence by the U.S. District Court as "Petitioner's Exhibit No. 2" (Record, Instrument No. 30: Reporter's Transcript of Proceedings, p. 11). The most important exhibits from the state court transcript have been printed in the Single Appendix, and page references will be made to that document whenever possible.

whole. For example, Defendant's Exhibit No. 2, entitled "Median Texas Family Income, By Race," shows that for the state as a whole median income level for Spanish-language or Spanish-surnamed families is only about two-thirds as high as that for "White" persons, as that term is defined by the Census Bureau. Since the category "White" also includes persons of Spanish surname or language, which subgroup tends to depress the income level of the comprehensive group, it can be safely assumed that the income gap between Anglos[2] and Mexican-Americans would be even more pronounced. Other exhibits show that Mexican-Americans throughout the state are less likely to hold the preferred jobs with higher pay and status, Defendant's Exhibit No. 5, App. 21, that they are much more likely to suffer incomes below the poverty level, Defendant's Exhibit No. 4, App. 20, and that they have not been afforded the same educational privileges as Anglos, Defendant's Exhibit No. 3, App. 19.

Although the state-wide statistics demonstrate a significantly inferior social and economic position for Mexican-Americans, the differences between Anglos and Mexican-Americans become extreme when attention is focused upon Hidalgo County alone. Defendant's Exhibit No. 6, App. 22, shows that 52.8% of the county's Mexican-American population have family in-

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[2]The term "Anglo" refers to persons who are "White" but who do not bear Spanish surnames or speak Spanish as a primary language.

comes below the poverty level, whereas the corresponding proportion of Anglo families living in poverty is only 13.7%. In addition to exhibits showing similar disparities in education and types of jobs held, Defendant's Exhibit Nos. 7 and 8, App. 23-24, there are figures for the county that graphically demonstrate the comparative living conditions of Mexican-Americans and Anglos. Defendant's Exhibit No. 9, App. 25, shows that when Mexican-Americans in Hidalgo County own their own homes, 49% of those homes have a value of less than $5,000. On the other hand, only 10% of the Anglo families live in dwellings of such nominal value. Of those who rent their housing, fully 70% of the Mexican-Americans pay rent of less than $50.00 per month, as compared to only 21% of the Anglos who find it necessary to live in homes that command such minimal rentals. At the higher end of the rental schedule the disparity between persons with Spanish surnames and those without is equally as great.

The tables and supporting documents comprising Defendant's Exhibits Nos. 2 through 10 demonstrated in graphic detail the vastly inferior social and economic position held by the Mexican-American majority in Hidalgo County during the period under examination. That evidence documents an all-too-obvious fact--that Mexican-Americans in Texas and in Hidalgo County have traditionally been and continue to be the objects of discriminatory treatment.

In his effort to show the disparity between the composition of the population

of Hidalgo County and the composition of the grand jury panels of which complaint is made, Partida introduced Defendant's Exhibit No. 11 (Record, Petitioner's Exhibit No. 2: Transcript 266) and Defendant's Exhibit No. 12 (Record, Petitioner's Exhibit No. 2: Transcript 268). Defendant's Exhibit No. 11, which is an excerpt from the 1970 Census Reports, demonstrates that the total population of Hidalgo County in 1970 was 181,535 persons, while Exhibit No. 12 shows that of such total population, 143,611 were persons of Spanish language or surname, being approximately 79.2% of the total population. Defendant's Exhibit No. 11 further shows that the persons of foreign stock in Hidalgo County total 80,420, and that 75,032, or 93.5%, of such persons declare Mexico to be their country of origin. For the purposes of the 1970 Census, the category "Foreign Stock" includes the foreign-born population and the native population of foreign or mixed parentage. Thus, almost 95% of all first and second generation Americans in Hidalgo County were persons of Mexican descent in 1970.

As the final evidentiary element in the development of his prima facie case of jury discrimination, Respondent introduced Defendant's Exhibit No. 1, App. 17-18 (Record, Petitioner's Exhibit No. 2: Transcript 228), entitled "Hidalgo County Grand Jury Panels, 1962-1972." Taken from the records of the Hidalgo County District Clerk, Defendant's Exhibit No. 1 presents a summary of the composition of the grand jury panels over a ten-year period on the basis of the Spanish surname or non-Spanish surname of the prospective

jurors. The list includes all those jury panels chosen by the various grand jury commissions through and including the March Term, 1972 jury which returned the indictment in this case. Of the 870 persons chosen as potential jurors, only 339, or 39.0%, were persons of Spanish surname. During the period while the incumbent state district judge was selecting the jury commissioners (Record, Petitioner's Exhibit No. 2: Transcript 228), 11 grand juries were selected, the panels for which were composed of 220 persons, 100 of whom were of Spanish surname--approximately 45.5% of the panels.

No effort was made by the State of Texas at the hearing before the state district court to explain or justify that gross 40.2% disparity between the ethnic composition of the Hidalgo County population and the composition of the grand jury panels over a period of ten years. The United States District Court decided to offer the Petitioner another opportunity to explain or justify the apparently discriminatory selection results. The federal trial court had originally dismissed Partida's habeas application without a hearing (Record, Inst. No. 3: Order of Dismissal), but subsequently reinstated the cause on its docket after being presented with argument and authorities from Respondent on his first Application For Certificate Of Probable Cause (Record, Inst. No. 4). In its first Memorandum And Order, App. 12-13, the District Court advised the sheriff that Partida had presented sufficient evidence of jury discrimination to shift the burden of proof to the state, and the court set a hearing for the purpose

of receiving such evidence, if any existed.

Given a second chance to offer evidence to explain the unequal results of the grand jury selection system, the Petitioner offered only the testimony of the state judge who initiated the selection process. The judge, who himself is of Mexican ancestry, App. 71, testified that he usually appointed a jury commission comprised of three Mexican-Americans and two Anglos, App. 64, and that he also tried to appoint a woman and a young person. App. 66. The judge further testified that he explained to the commissioners the statutory qualifications for grand jury service, but that he did not instruct them on their duties under the Constitution to select jurors who are representative of a cross-section of the community. App. 79. Finally, the state judge testified that the selection process, regardless of the period of time being considered, had not resulted in grand jury panels that were representative of the ethnic balance in Hidalgo County. App. 84.

Although the burden had been squarely placed upon the State by the District Court, there was no evidence forthcoming that would tend to explain the 40.2% disparity in the population figures. Noteworthy by its absence was any statistical evidence that would show that Mexican-Americans in disproportionate numbers do not meet the statutory qualifications of citizenship, language ability, being of sound mind and good moral character, or being convicted felons and persons under indictment. For example, there is no suggestion in the record that language dis-

qualified any Mexican-American; to the contrary, the state judge testified that the only person in his experience who asked to be excused for language reasons was an Anglo who was of Polish descent. App. 73. Indeed, the State did not even offer any protestations of good faith from the jury commissioners who were responsible for selecting such disproportionately small numbers of Mexican-Americans.

SUMMARY OF THE ARGUMENT

Rodrigo Partida was indicted for and convicted of the offense of burglary by an Hidalgo County, Texas grand jury. He complains that the jury that returned the indictment had a characteristic in common with all grand juries in the county over at least the previous ten years--that Mexican-Americans were systematically excluded or underrepresented on the grand jury venires. It is the settled law of the land that an indictment is void if it has been returned by a grand jury from which an identifiable class or group has been systematically excluded or underrepresented.

The standards used to test grand juries and petit juries are essentially the same, and the norm to be achieved is a jury that is representative of a fair cross-section of the community. The jury, be it grand or petit, is to be composed of "the peers or equals of the person whose

rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Strauder v. West Virginia, 100 U.S. 303, 308 (1880). Although the jury pools or the source from which jurors are drawn must strive for the representative norm, a criminal defendant cannot complain if his particular jury does not reflect a mirror image of the community's demography, for exact proportional representation is not required.

This Court has provided an analytical tool for the evaluation of jury discrimination claims. Under the "rule of exclusion," as announced in Norris v. Alabama, 294 U.S. 587 (1935), the party claiming jury discrimination bears the burden of proving a prima facie case. The usual method of proof is to demonstrate a substantial disparity between the percentage of the class or group in the jurisdiction as a whole and of the class on the jury list or other source from which the actual jurors are selected. Once such a disparity is shown, particularly where the selection system lends itself to discrimination, then the burden shifts to the state to offer evidence that would explain or justify the apparently discriminatory results on some basis that is constitutionally legitimate. Where the selection system relies upon the subjective, unfettered discretion of jury commissioners, or "key men," the

state's rebuttal evidence is subjected to "close scrutiny."

Although apparently blacks are not required to make such a showing, other groups claiming exclusion from the juries must prove that they are an identifiable class in the jurisdiction in question and that they are subject to discriminatory treatment. Mexican-Americans in the Southwest are such an identifiable class. Hernandez v. Texas, 347 U.S. 475 (1954). Through the use of census statistics Respondent showed to the apparent satisfaction of all concerned that Mexican-Americans in Hidalgo County and the State of Texas comprised just such an identifiable class in the community, one that has long been victimized by discriminatory practices. Specifically, statistics on income and poverty status, occupations, education and housing clearly demonstrated the inferior social and economic position held by those of Mexican descent in the county. Indeed, that contention has never been contested by Respondent and has been assumed by the lower courts.

Respondent commenced the proof of his prima facie case by showing that the Hidalgo County population in 1970 was 181,535 persons, 143,611 of whom (79.2%) were persons of Mexican descent. Partida's prima facie case of purposeful jury discrimination was based upon (1) the underrepresentation of his ethnic group by 29.2% on the list

of grand jurors drawn by the commission, (2) the underrepresentation of Mexican-Americans by 37.5% on the actual grand jury that returned the indictment against him, (3) the systematic, long-standing underrepresentation of Mexican-Americans by 40.2% on the grand jury venires over a ten-year period, or by 33.7% during the period while the incumbent state judge was selecting the commissioners, (4) the use by the State of Texas of a system of selection that relies upon the unfettered subjective discretion of "key men" as the source for potential jurors, (5) the easy identification of Mexican-Americans through their Spanish surnames by those who would discriminate, and (6) the failure of the state trial judge to instruct his commissioners not to discriminate on the basis of national origin.

The State failed to offer an adequate explanation in rebuttal of Respondent's prima facie case, even though the District Court had forewarned Petitioner that such an explanation was required. The only witness called by the State was the judge who selected the commissioners. That judge testified that he attempted, albeit unsuccessfully, to obtain a jury commission representative of the community on the basis of national origin, race, sex, and age. However, he further testified that he did not instruct the jury commissioners to achieve the same balance in selecting the grand jury venire. The

State offered no statistical evidence that would disqualify disproportionately large numbers of Mexican-Americans on the basis of alienage, language, character, or felony convictions.

The District Court's efforts to distinguish all precedent decisions on the basis of a perceived "governing majority" status of Mexican-Americans in the community, finds little, if any, support in the record or in the decisions of this Court. Ratification of the District Court's rule would effectively repeal the Fourteenth Amendment's promise of representative juries in the trial of criminal causes in South Texas. Such rule is based upon a presumption, never proven, that Mexican-American Commissioners cannot make conscious or subconscious selection decisions that deny full participation in the jury system to members of their own ethnic group. In the face of such overwhelming evidence of discrimination, the State's rebuttal must rest on a more solid foundation. For, as the Court of Appeals noted, "the disparities are too great and the proof offered too paltry." 524 F.2d 481, 485.

ARGUMENT

The Long-Standing, Systematic Exclusion or Underrepresentation of Mexican-Americans From the Grand Juries of Hidalgo County, Texas, Including the Grand Jury Which Indicted the Respondent, Denied Him Equal Protection and Due Process of Law.

For almost one hundred years it has been the settled law of the land that a criminal conviction cannot be sustained if it was obtained from juries, either grand or petit, from which an identifiable class has been systematically excluded. Strauder v. West Virginia, 100 U.S. 303 (1880); Neal v. Delaware, 103 U.S. 370 (1881). The right to be indicted and tried by fair and impartial juries is one of the cornerstones of our system of criminal jurisprudence.

> These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well. Peters v. Kiff, 407 U.S. 493, 502-503 (1972).

Emphasizing that the subject at hand --the grand jury--is a vital link in the criminal justice system and not "... a mere constitutional frill or furbelow," Muniz v. Beto, 434 F.2d 697, 698 (5th Cir. 1970), the Chief Justice recently described this august institution's role in the following language:

> The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand

> jury continues to function as a barrier to reckless or unfounded charges. "Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." Costello v. United States, 350 US 359, 362, 100 L. Ed. 397, 76 S Ct 406 (1956). Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance. United States v. Mandujano, ___U.S.___, 48 L.Ed.2d 212, 219 (1976) (emphasis added).

As suggested by the Chief Justice, the standard to be achieved is a jury that is representative of a cross-section of the community, for "[i]t is a part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (1940). Although it is not necessary that any one particular jury or jury list be proportionately representative of all identifiable classes in the community, Akins v. Texas, 325 U.S. 398, 403 (1945), "[t]he aim and purpose of the law is to obtain juries which truly represent a cross-section of the community...." Billingsley v. Clayton, 359 F.2d 13, 18 (5th

Cir. en banc, 1966). See also, Fay v. New York, 332 U.S. 261 (1947); Glasser v. United States, 315 U.S. 60 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Ballard v. United States, 329 U.S. 187 (1946); Carter v. Jury Commissioners of Greene County, 396 U.S. 320 (1970); and Peters v. Kiff, supra. On even another occasion within the last year, the fair cross-section standard was reiterated:

> Both in the course of exercising its supervisory powers over trials in federal courts and in the Constitutional context, the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a cross-section of the community. Taylor v. Louisiana, 419 U.S.522, (1975).

The principle case cited by the Court in support of the fair cross-section requirement was Smith v. Texas, supra, in which the constitutionality of the composition of a grand jury was being considered. Thus, the applicability of such a standard to the jury that indicted Partida is readily apparent.

The standard to be achieved is a representative cross-section of the community; consistent failure over an extended period of time to achieve that standard is strong, objective evidence of purposeful discrimination by the selection system's administrators. Should the administrators fail to produce a suitable explanation for the

disparate results, the conviction obtained at the hands of the unrepresentative jury is void. Norris v. Alabama, 294 U.S. 587 (1935). These constitutional principles are well established and seldom disputed. Instead, issue is generally joined on questions of proof. The present case is no exception.

A. Mexican-Americans Are An Identifiable Class Subject To Discrimination.

The accused citizen complaining of jury discrimination bears the initial burden of showing that an identifiable, cognizable class or group exists within the community encompassed by the court's jurisdiction, a class or group that is subject to discrimination. Hernandez v. Texas, 347 U.S. 475 (1954); United States v. De Alba-Conrado, 481 F.2d 1266 (5th Cir. 1973). Hernandez settled the question that Mexican-Americans may be an identifiable ethnic group subject to discriminatory treatment, particularly in the Southwest, and that the Fourteenth Amendment is equally as applicable to discrimination based upon national origin as it is to discrimination based upon race.

Respondent supplied ample proof that his ethnic group is an identifiable class subject to discrimination in Hidalgo County. As background, he called the attention of the state courts and the federal trial court to a recent opinion in a school

desegregation suit entered by the same district court. Cisneros v. Corpus Christi Independent School District, 324 F.Supp. 599 (S.D. Tex. 1970), aff'd, 467 F.2d 142 (5th Cir. 1970). That court, having found that Mexican-Americans do not participate proportionately with their number in the different occupational levels, or income levels, or residential distribution within the community, stated as follows:

> [I]t is clear to the Court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic minority in the United States, and especially so in the Southwest, in Texas, and in Corpus Christi. This is not surprising; we can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course, their Spanish surnames. And if there were any doubt in this Court's mind, this Court could take notice, which it does, of the Congressional enactments, governmental studies and commissions on this problem. 324 F.Supp. 599, 607-608.

In a footnote to the quoted language the court indicated that it took judicial notice of, inter alia, Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c, et seq.; a report of the United States Commission on Civil Rights, entitled

"Ethnic Isolation of Mexican-Americans in Public Schools of the Southwest;" regulations of the United States Department of Health, Education and Welfare implementing Title VI of the Civil Rights Act of 1964, and the Congressional creation of the Committee on Opportunity for Spanish-Speaking People. The cited reports, statutes and regulations were looked to by the court as evidence that Mexican-Americans comprise a segment of our society that has long been subject to discriminatory practices so pervasive as to require governmental intervention to attempt to reduce their impact on that class of our citizenry.

But rather than relying solely on governmental reports and statutory enactments as his proof that Mexican-Americans are subject to discriminatory treatment in Hidalgo County, Respondent submitted an abundance of data from the 1970 Census that conclusively shows that Mexican-Americans, both in the State of Texas and in Hidalgo County, are disproportionately treated to a lower economic status, inferior education, and inferior housing, vis-a-vis their Anglo brothers. For example, Defendant's Exhibit 6, App. 20, which was admitted in support of his Amended Motion For New Trial in the state trial court (Record, Petitioner's Exhibit No. 2: Transcript 29), indicates that well over half of the Mexican-American population of the county falls into the poverty category, while only 13.7% of the Anglo population had incomes below the poverty level. Furthermore, the statistics offered on occupational categories and housing

quality lead one unswervingly to the conclusion that the 20% Anglo minority overwhelmingly dominates the economic and social life of the community. Although the signs saying "No Mexicans Served" have come down, Hernandez v. Texas, supra, at 479, it cannot be denied in the face of such statistics that Mexican-Americans are still the victims of discrimination. Indeed, in his briefs and arguments in this Court and the lower courts, Petitioner has not really disputed the obvious fact that persons of Mexican ancestry in South Texas constitute an identifiable class subject to discrimination.

B. Respondent Proved A Prima Facie Case Of Jury Discrimination.

After proving to the satisfaction of the courts below that Mexican-Americans were a cognizable group subject to discrimination, it next became incumbent upon Respondent to prove that Mexican-Americans were in fact the victims of discrimination in the application of the jury selection laws in Hidalgo County. In doing so, Partida relied upon the "rule of exclusion" announced by this Court in Norris v. Alabama, 294 U.S. 587 (1935).

Norris provided the judiciary an analytical tool for the evaluation of jury discrimination claims. Proof of claims in the earlier cases, e.g. Strauder v. West Virginia, 100 U.S. 303 (1880) and Neal v. Delaware, 103 U.S. 370 (1881), was not required, since the exclusion of blacks

was then mandated by statute. In Norris, the Court was confronted with a statutory scheme that made no mention of race or color, the claim being that the facially neutral statute was unconstitutionally applied. The defendant showed that in a county where blacks composed 7.5% of the adult population, there had never been a black grand juror in the memory of the witnesses. It was held that a prima facie case of discriminatory application of the selection process had been demonstrated by the defendant, notwithstanding the state official's denials of discriminatory conduct.

Since Norris, most jury discrimination claims have been evaluated in the framework of the "rule of exclusion." Many of the cases subsequent to Norris were, like Norris itself, based upon allegations of the total exclusion of blacks from the juries, a relatively easy matter to resolve. See Hale v. Kentucky, 303 U.S. 613 (1938); Pierre v. Louisiana, 306 U.S. 354 (1939); Hill v. Texas, 316 U.S. 400 (1942); Patton v. Mississippi, 332 U.S. 463 (1947); Reece v. Georgia, 350 U.S. 85 (1955); and Eubanks v. Louisiana, 356 U.S. 584 (1958). Similarly, the cases involving the token inclusion of blacks provided only moderate analytical difficulties. E.g., Smith v. Texas, 311 U.S. 128 (1940); Arnold v. North Carolina, 376 U.S. 773 (1964).

If Strauder, Norris, and Smith are considered to be typical of the first three generations of jury discrimination claims, then the present litigation properly belongs in a fourth generation--

the "underrepresentation" cases. One of the earliest "underrepresentation" cases was Cassell v. Texas, 339 U.S. 282 (1949). Some eight years after this Court had reversed a Dallas County conviction on the grounds of the total exclusion of blacks from grand juries, Hill v. Texas, 316 U.S. 400 (1942), the Court was presented for the second time, after Akins v. Texas, 325 U.S. 398 (1945), with a claim that the jury commissioners in Dallas County were intentionally limiting the number of blacks chosen for grand jury service to one per jury list. The evidence indicated that the Negro population of Dallas County was approximately 15.5% of the total population, although only 6.5% of the registered voters were black. Since eligibility to vote was a qualification for jury service, the Court compared the number of blacks serving on the jury panels--6.7% of the 21 grand juries--with the proportion of blacks on the voter registration lists, and held that the defendant had failed to make out a prima facie case based upon the statistics alone. However, the Court reversed the conviction because of the testimony of the commissioners that their failure to place more blacks on the panels was due to their lack of knowledge of other qualified Negroes.

A reference point for resolution of "underrepresentation" claims has not yet been clearly established. Nevertheless, recent decisions are instructive and do help to establish the outer limits of the applicability of the "rule of exclusion." The leading decisions are Swain v. Alabama,

380 U.S. 202 (1965); Whitus v. Georgia, 385 U.S. 545 (1967); Carter v. Jury Commission of Green County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); and Alexander v. Louisiana, 405 U.S. 625 (1972).

As the first of the recent "underrepresentation" decisions, Swain v. Alabama, supra, was the only one of the series in which the Court held that the claimant failed to sustain his burden of proving a prima facie case of discrimination. The principal issue to be determined in Swain was the constitutionality of the use of peremptory challenges to totally exclude blacks from petit juries. However, before reaching the troublesome peremptory challenge issue, the Court disposed of the petitioner's claim that blacks had been systematically underrepresented on the grand jury panels. The adult black population of Talladega County was shown to be approximately 26.0% of the total adult population. Although the opinion does not disclose the size of the petit jury venires, it does appear that the grand jury panels during the period in question had about 33 members. Mr. Justice White's majority opinion stated that the inclusion of six to eight Negroes (18.1% to 24.2%) on the grand jury panels did not amount to "token inclusion" within the meaning of previous decisions. Likewise, the inclusion of only 10 to 15% blacks on the grand jury panels and petit jury venires, including one case where black participation reached 23%, failed "to make out a prima facie case of invidious discrimination under the Fourteenth Amendment." 380 U.S. 202, 205-206.

As in Akins v. Texas, 325 U.S. 398 (1945), the Court held that proportional representation of all races and cognizable classes on any one particular grand jury or petit jury venire is not constitutionally mandated.

> Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury role from which petit jurors are drawn. (citations omitted) Neither the jury role nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.
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> * * *
>
> We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%. (citations omitted). Swain v. Alabama, 380 U.S. 202, 209.

Weight was also given to the fact that the jury commissioners, testifying on behalf of the State, denied that racial considerations had entered into the selection process. Rather, they testified that

racially neutral lists and sources had been used in compiling the jury rolls. That testimony contrasts sharply with the evidence in the present litigation, for here the State did not even bother to present the commissioners to dispute the very serious allegations of discrimination levied against them.

Other dissimilarities exist. Whereas in Swain, the "overall disparity has been small," 380 U.S. 202, 209, here the disparity has been both enormous and consistent. Likewise in Swain, there was no evidence that the commissioners had the means at hand to identify potential black jurors; the Hidalgo County commissioners could make that identification by merely reading the would-be juror's Spanish surname.

Less than two years after the decision in Swain v. Alabama, the Court decided its next major underrepresentation case, Whitus v. Georgia, 385 U.S. 545 (1967). A unanimous Court voided two convictions that were obtained at the hands of juries, both grand and petit, that were underrepresentative of the substantial black population in the jurisdiction. The opinion in Swain was neither distinguished nor even mentioned by the Court.

The petitioners' previous convictions for murder had been set aside, both by this Court and by the Court of Appeals. Subsequent to the second reversal, the state officials revised the jury list that had been declared discriminatory by the federal courts. Nevertheless, the jury

commissioners continued to use a segregated tax digest, in which the names of blacks were followed by a "(c)," as the primary source for jurors. The defendants were apparently challenging the first jury list drawn by the commissioners after the previous reversal of their convictions, and therefore were not in a position to demonstrate a long-standing statistical pattern of underrepresentation. Instead, they were required to demonstrate purposeful discrimination on the basis of one single selection event.

The evidence offered by the petitioners in the proof of their grand and petit jury claims showed that the adult male population of the county was 42.6% black and that 27.1% of the tax rolls were composed of Negroes. The commissioners drew 33 prospective jurors for grand jury service, of whom only three (9.1%) were blacks. Of the petit jury venire of ninety persons, only 7, or 7.8%, of that number were Negroes. The Court held that this proof alone made out a prima facie case of purposeful discrimination.

> Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion. 385 U.S. 545, 552.

Following shortly on the heels of Whitus, the Court reversed two more Georgia convictions in unanimous per curiam opinions. Jones v. Georgia, 389 U.S. 24 (1967) and Sims v. Georgia, 389 U.S. 404 (1967). In Jones, the petitioner proved that 30.7% of the adult population of the county was Negro, that 19.7% of the taxpayers were Negroes, and that only 5.0% of the jurors on a single list were Negroes. The Court rejected the efforts of the Georgia Supreme Court to distinguish Whitus on the basis of a presumption that the jury commissioners discharged their sworn official duties. The proof in Sims showed the use of the same segregated tax rolls as the source for jurors, a source which contained 24.4% blacks. Nevertheless, only 4.7% of the names on the single grand jury list and 9.8% of the names on the traverse jury list were of black citizens. Following Whitus, the Court reversed Sims' conviction for rape.

In 1970 the Court decided the companion cases of Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) and Turner v. Fouche, 396 U.S. 345 (1970), in which, for the first time, plaintiffs in a civil case, instead of criminal defendants, raised the claims of jury discrimination. Both cases brought into issue the constitutionality of the state statutes governing the selection process, seeking to have those statutes declared facially unconstitutional. The Court rejected those attempts. Nevertheless, in both cases the Court found that the plaintiffs had proven prima facie cases of jury discrimination justifying injunctive relief.

Although in Carter the prima facie case issue was not appealed by any of the parties, this Court impliedly approved of the District Court's finding that the plaintiffs had met their burden of proof. The statistical case offered by the plaintiffs showed that of the 1,198 potential jurors, only 32% of the total were black in a county where the total population was estimated to be about 65% Negro. The Court found that statistical case, in the context of the selection method used, to present a "compelling" record of discrimination. 396 U.S. 320, 337. As Mr. Justice Stewart noted in his opinion for the Court:

> The exclusion of Negroes from jury service because of their race is "practically a brand upon them * * *, an assertion of their inferiority * * *." (citation omitted) That kind of discrimination contravenes the very idea of a jury--"a body truly representative of the community," (citation omitted) composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Strauder v. West Virginia, 100 U.S. 303, 308.
>
> Carter v. Jury Commission of Greene County, 396 U.S. 320, 330.

Turner v. Fouche, supra, unlike Carter, clearly presented the evidentiary issue on the jury discrimination claim. The evidence indicated that blacks comprised 60% of the general population in Taliaferro County, Georgia, but only 37% of a single 304-member grand jury list. That grand jury list had been compiled pursuant to the instructions of a 3-judge District Court, but the jury commissioners had disqualified inordinate numbers of blacks for lack of "intelligence" or "uprightness," and furthermore had failed to make appropriate inquiries regarding a substantial number of citizens of the community who were unknown to the commissioners.

> In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it. 396 U.S. 346, 360.

The last case decided on the merits of the underrepresentation issue was Alexander v. Louisiana, 405 U.S. 625 (1972). Again, the Court was reviewing a claim involving the selection of a single jury,

as opposed to a claim of a continuing pattern of discrimination lasting over several jury selection events. In Lafayette Parish, 21% of the adult population was Negro. The jury commissioners used a questionnaire to locate qualified jurors, and by the use of that device reduced the black participation in the pool to 14%. Two more selections reduced the list of 400 to 7% black participation, which further dropped to 5% on the defendant's grand jury venire and to zero on the grand jury that actually indicted him. The unanimous opinion of the Court found a prima facie case of discrimination based upon the selection system itself, which provided an opportunity for discrimination, as well as upon the statistics themselves.

> The progressive decimation of potential Negro grand jurors is indeed striking here, but we do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. 405 U.S. 625, 404.

Having reviewed the major decisions of this Court in underrepresentation cases, the strength of the prima facie case made out by this Respondent can now be emphasized. Obviously, as a first comparison, the mathematical disparity of 42.2%, expressed in absolute terms, is much more blatant than in Swain (11%), Whitus (33.5%),

Sims (19.7%), Jones (25.7%), Carter (33%), Turner (23%) and Alexander (14.2%). It might also be useful to compare the statistical disparities existing in this case with those in some lower court decisions: Murrah v. Arkansas, 532 F.2d 105 (8th Cir. 1976) (prima facie case: 19.7% adult black population, but only 5.6% to 7.3% on jury roll); Thompson v. Sheppard, 490 F.2d 830 (5th Cir. 1974) (no prima facie case: 30.2% total black population, and 19.2% black representation on jury lists drawn at random from county voting list); Black v. Curb, 464 F.2d 165 (5th Cir. 1972) (prima facie case: 69% total black population and 60% adult black population, but only 35% black representation on jury list); Colson v. Smith, 438 F.2d 1075 (5th Cir. 1971) (prima facie case: 30.7% adult black population and 14% black taxpayers, but only 1.2% blacks on venires and 1.3% black representation in grand jury pool); Preston v. Mandeville, 428 F.2d 1392 (5th Cir. 1970) (prima facie case: 29.3% adult black population, but only 15% black representation on master jury roll); Muniz v. Beto, 434 F.2d 697 (5th Cir. 1970) (prima facie case: between 15% and 20% registered Mexican-American voters, but only 3% of grand jurors during ten-year period); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969) (no prima facie case: 20.48% black population, and 15.77% black representation in jury wheel); Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969) (prima facie case: 55% adult black population, but only 12.9% and 7% black representation on jury rolls in last two years); Jones v. Smith, 420 F.2d 774 (5th Cir. 1969) (prima facie case: 31.9% adult black population and 15.3% black taxpayers,

but only 4.85% black representation on single jury panel drawn from segregated tax digest); Hunt v. United States, 400 F.2d 306 (5th Cir. 1968) (no prima facie case: 35% total Mexican-American population, with 17.5% Mexican-American representation in the jury pool); Pullum v. Greene, 396 F.2d 251 (5th Cir. 1968) (prima facie case: 55.5% total black population, but only 17.9% and 21.7% black representation on revised jury lists); Goins v. Allgood, 391 F.2d 692 (5th Cir. 1968) (prima facie case: 32% total black population, but only 16% blacks on grand juries); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. en banc, 1966) (prima facie case: 34.5% black voters, but only 5.9% black representation on jury lists); Labat v. Bennett, 365 F.2d 698 (5th Cir. en banc, 1966) (prima facie case: 32% total black population, but only 3.7% black representation on venires); Scott v. Walker, 358 F.2d 561 (5th Cir. en banc, 1966) (prima facie case: 15% registered black voters but only 3 to 5 blacks among 300 veniremen over previous 5-year period, though proof was scarce); Davis v. Davis, 361 F.2d 770 (5th Cir. en banc, 1966) (prima facie case: 20% total black population and 16% adult male black population, but only 7.5% blacks on jury venires and jury commissioners failed to seek out qualified blacks); Vanleeward v. Rutledge, 369 F.2d 584 (5th Cir. 1966) (prima facie case: 30% adult black population and 14% black taxpayers, but only .75% blacks on jury lists).

The 40.2% underrepresentation of Mexican-Americans over a 10-year period

in Hidalgo County is greater than the disparities existing in any of the cases cited above, with the exception of the 42.1% to 48% disparity in Salary v. Wilson, supra. The disparity in the percentages is greater than that characterized as "vast" in Muniz, supra (12% to 17%) and as "tremendous" in Vanleeward, supra (29.25%). Both the District Court and the Court of Appeals recognized that the gross disparities in Hidalgo County, by and of themselves, made out a prima facie case of purposeful discrimination. Though apparently not recognized by the District Court, Respondent's proof went even further.

That additional proof in support of his prima facie case is the Texas selection system itself. Although passing constitutional muster on several previous occasions before this Court, Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); and Hernandez v. Texas, 347 U.S. 475 (1954), it is still a system whose "potential for abuse is great," as recognized by the District Court. 384 F.Supp. 79, 91. The vice, of course, is its invitation to the jury commissioners to exercise their wholly-unfettered subjective discretion in the selection process. Indeed, the state trial judge testified in the habeas corpus hearing below that he did not even give instructions to the jury commissioners regarding their obligation to choose an ethnically representative list of potential jurors. App. 79. It should not be surprising, then, that the panel chosen by the commissioners for the March Term, 1972, was underrepresentative of Mexican-Americans by 30%.

It should also be emphasized that the disparities in the case under consideration were not the product of an isolated, fortuitous event. Rather than relying upon the results in the selection of the single jury that returned the indictment against him, as in Whitus and Alexander, Partida offered the lower courts 47 separate selections by the various Hidalgo County jury commissioners. App. 17-18. Those selections demonstrate a consistent, uniform pattern of underrepresentation lasting over an extended period of time. More than any other single element of proof, that long-term pattern of exclusion demands a finding of discrimination.

In summary, Respondent proved a prima facie case of purposeful jury discrimination based upon (1) the underrepresentation of his ethnic group by 29.2% on the list of grand jurors drawn by the commission, (2) the underrepresentation of Mexican-Americans by 37.5% on the actual grand jury that returned the indictment against him, (3) the systematic, long-standing underrepresentation of Mexican-Americans by 40.2% on the grand jury venires over a ten-year period, or by 33.7% during the period while the incumbent state judge was selecting the commissioners, (4) the use by the State of Texas of a system of selection that relies upon the unfettered subjective discretion of "key men" as the source for potential jurors, (5) the easy identification of Mexican-Americans through their Spanish surnames by those who would discriminate, and (6) the failure of the state trial judge to instruct his commissioners not to discriminate on the basis of national origin. Hence, both the

District Court and the Court of Appeals correctly held that Respondent had proven his prima facie case; it remained for the prosecution to come forward with sufficient evidence to rebut that case, if such evidence existed.

C. The State Failed To Rebut Respondent's Prima Facie Case.

As indicated above, the lower courts agreed that Partida had proven a prima facie case. They disagreed on whether the State had offered an adequate explanation for the apparently discriminatory results. That difference in the assessment of the adequacy of the State's rebuttal case flows in part from the more rigorous standard imposed by the Court of Appeals for the evaluation of the State's proferred evidence.

> [T]he unbridled discretion afforded the jury commissioners to prepare the grand jury list requires close scrutiny of the disparities and the proof offered to explain them. Partida v. Castaneda, 524 F.2d 481, 484 (5th Cir. 1975).

Accord, Murrah v. Arkansas, 532 F.2d 105, 110 (8th Cir. 1976). As will be seen, we submit, the State's proof cannot meet even a lenient standard of review, much less the "close scrutiny" of this Court.

In evaluating the rebuttal case offered by the Petitioner, it should be borne in

mind that two opportunities have been presented to the State to produce a constitutionally legitimate explanation for the blatantly discriminatory results of the jury selection process. Indeed, the State came to the habeas corpus hearing in the District Court forewarned that the Sheriff would bear the burden of proving an adequate explanation for the unequal treatment received by Mexican-Americans in Hidalgo County. See Memorandum And Order, April 15, 1974. App. 12-13. The failure to produce adequate evidence in the face of the District Court's order must raise a presumption that an adequate explanation does not exist.

To rebut Partida's prima facie case, the State called only one witness--the state trial judge who supervised and participated in the selection of the grand jury that indicted Respondent. Judge Alamia, himself a Mexican-American, was never asked for his opinion by the Petitioner as to how the jury panels in Hidalgo County could be so enormously and so consistently disproportionate to the ethnic balance in the community. Moreover, the judge admitted that the results of the selection process were not representative of a cross-section of the Hidalgo County community.

No evidence was offered by the State to rebut the statistics presented by Respondent, either the statistics showing that Mexican-Americans as a class were subject to discrimination nor the statistics from the Court's records showing that the predominant ethnic group in the county had never been represented on grand juries

in numbers proportionate to their numbers in the community. The State did not even offer the testimony of any of the jury commissioners who selected Partida's grand jury, commissioners who might have been able to explain how they managed to select a jury panel that was 30% underrepresentative of Mexican-Americans. The failure of the State's rebuttal evidence left the District Court to attempt explanations on its own, explanations that in most part were unsupported by any evidence in the record. For example, the lower court thought that perhaps a greater proportion of Mexican-Americans would be excluded because there was a "larger ineligible migrant and illegal alien population" in the county. 384 F.Supp. 79, 89. In addition to the fact that there is absolutely no evidence in the record to support those conclusions, at least one is patently erroneous. If the District Court was referring to migrant farm workers as a sub-class of Mexican-Americans who would be excluded from jury service, that conclusion is incorrect. There is nothing about a seasonal farm worker's occupation, an occupation that takes him out of the state for three or four months during the summer harvest season, that disqualifies him from grand jury service. The migrant farm worker remains a Texas resident for purposes of voting, jury service, and other similar civil rights and duties.

The District Court also believed that the disparity could apparently be explained by taking a fewer number of years into consideration in the selection results. Respondent had offered the ten-year sample

as showing a historical pattern of exclusion or underrepresentation of the group in question, thereby reducing to approximately infinity the possibility that the results in the composition of his grand jury were merely fortuitous. The District Court thought a more limited number of years would be appropriate, since it categorized the county as one undergoing "rapid growth," and as being a "rapidly changing area." 384 F.Supp. 79, 89. Again, there was simply no evidence in the record to support such a conclusion, but irregardless of the period of time chosen, the disproportion is merely reduced to 33.7% from 40.2%. Such a vast disparity, particularly when coupled with the abuse-prone Texas selection system, must still point firmly in the direction of discrimination.

Perhaps the most plausible explanation offered by the District Court is one which does not pass Equal Protection scrutiny. The lower court suggested that the state trial judge chose jury commissioners from his own high socio-economic level, and that those commissioners, in turn, chose potential grand jurors from the same high socio-economic class. 384 F.Supp. 79, 90. Once more, the State had failed to produce any evidence that the judge or commissioners were influenced by such considerations. Nevertheless, that explanation merely substitutes discrimination on the basis of wealth for discrimination on the basis of national origin, both of which are condemned. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Labat v. Bennett, 365 F.2d 698 (5th Cir. en banc, 1966).

See also, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956); and Smith v. Bennett, 365 U.S. 708 (1961). Though the explanation offered may be a plausible one, it is not a constitutionally legitimate one.

Hampered by the deficiencies in the record caused by the failure of the State's proof, the District Court sought to distinguish all precedent decisions in this field of litigation on the basis that the victims of that discrimination were either a minority or a "non-governing majority." In support of such a distinction the lower court cited Black v. Curb, 464 F.2d 165 (5th Cir. 1972); Turner v. Fouche, 396 U.S. 346 (1970); Pullum v. Greene, 396 F.2d 251 (5th Cir. 1968); and Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969). Not only do none of the cited opinions articulate the "non-governing majority" distinction, none of them, with the possible exception of Turner, even discussed the level of political participation by the class subjected to discrimination. The Turner opinion mentions political participation only tangentially and in connection with the unusual role played by the grand jury in the election of the board of education. There is absolutely no suggestion that blacks in Georgia would not be heard to complain of discrimination if they were a "governing majority."

The "governing majority" distinction is not only completely without precedent, but it would be an extremely dangerous and cumbersome departure from the law of jury discrimination. For example, the District

Court's announcement that Mexican-Americans are a "governing majority" in Hidalgo County has virtually no support in the record in this case. There are no figures showing the numbers of registered Mexican-American voters as compared to Anglo voters, nor the number of Mexican-American officeholders and the types of offices held. Needless to say, the level or degree of participation by any identifiable class or group in the processes of the body politic is a frequently difficult determination, even by experts in the field of political science.

Not only would the "governing majority" rule be cumbersome and difficult in its application, it would be dangerous as well. The lower court has announced the rule that once a class of victims has achieved "governing majority" status, then members of that class may no longer complain of a conviction obtained at the hands of a jury from which members of the class have been systematically excluded. Such a rule mocks the Fourteenth Amendment's promise of a trial before an impartial jury of one's peers.

The Court of Appeals correctly rejected the District Court's effort to afford the State a sanctuary behind the all-encompassing walls of the "governing majority" doctrine.

> The fact of governing majority status may mollify the prima facie case, but it does not nullify it. This may be done only by proof to explain the disparity. Without it, petitioner

> must prevail. Partida v. Castane
> 524 F.2d 481, 484 (5th Cir. 1975)

In addition to the foregoing, the Respondent contends that the "governing majority" notion is essentially meaningless. Whether Mexican-Americans constitute a voting majority and whether they hold offices unrelated to the jury selection system can have only the most indirect of bearing on the issue of discrimination in the selection of grand jurors. Undoubtedly the element causing the District Cou the greatest concern was the involvement of a Mexican-American judge and a majorit of Mexican-American commissioners in the selection of Partida's jury. The theme of the lower court's opinion, taken in it entirety, is a concern that a discriminatory intent not be imputed to the state judge and jury commissioners, unless dire evidence of such intent were to be presented by Respondent. That concern overlooks the fact that year after year, list after list, Mexican-Americans have been substantially underrepresented on Hidalgo County grand juries. That result, violative of the constitutional obligations of the jury commissioners, is obvious even to the most casual observer.

> If one factor is uniform in a continuing series of events tha are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious dis-

> regard of what is conceived to be a binding duty. Prohibited conduct may result from a misconception of what duty requires. Such misconception I believe to be the real situation on the record before us. Cassell v. Texas, 339 U.S. 282, 293 (1950) (Frankfurter, J., concurring).

That Mexican-American commissioners would select Anglos in disproportionate numbers to their own ethnic group is not a phenomenon unique to South Texas, nor does it vitiate the Respondent's prima facie case of discrimination. A very recent opinion of another Court of Appeals shows the same forces at play. Murrah v. Arkansas, 532 F.2d 105 (8th Cir. 1976). In a jurisdiction where approximately 19.7% of the population was black, the state court chose ten jury commissioners, two of whom were black. Nevertheless, those jury commissioners returned jury venires that were only 5.6% to 7.25% Negro. The Court of Appeals found discrimination on the basis of that record, in spite of the fact that 20% of the commissioners were themselves black. The testimony of those commissioners was particularly illuminating. One of the black commissioners testified that he submitted names of more black persons than white, while the other indicated that she had picked only one or two black persons, and the rest white. Such results graphically demonstrate the subtle interplay of the various forces existing in the selection process.

Other instances of similar conduct by the victims of discrimination have occurred in the history of this Court's decisions. In Green v. School Board of New Kent County, 391 U.S. 430 (1968), the Court considered the validity of a "freedom-of-choice" plan to desegregate a school district in Eastern Virginia. This Court's rejection of the school authorities' plan was based, in part, on the fact that 85% of the Negro school children still attended a segregated school even though they were free to attend the previously all-white school. Obviously, well-entrenched and long-standing patterns of social behavior do not change easily, whether the subject be service on juries or school attendance.

The State seems to rely upon a presumption, never proven, that Mexican-American jury commissioners would not consciously or sub-consciously make selection decisions that effectively exclude a vastly disproportionate number of their own ethnic group from the grand juries. The presumption sought by the State is simply at odds with the overwhelming evidence in the record. Furthermore, that presumption would countenance a profound departure from the oft-articulated norm of the jury as being representative of a cross-section of the community. The State would have this Court approve a selection process that has subverted the fair cross-section goal, making a 100% change in the qualitative flavor of the jury from what should be 80% Mexican-American participation to 80% Anglo participation. Just as a mirror image

should not be required, neither should a surrealistic distortion be ratified.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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August, 1976